RECORD AND BRIEF

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No. 15-1498

IN THE

Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL,
Petitioner,

v.

JAMES GARCIA DIMAYA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae National Association of Federal Defenders (NAFD) was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. NAFD is a nationwide, non-profit, volunteer organization. Its membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. One of the guiding principles of NAFD is to promote the fair administration of justice by appearing as *amicus curiae* in litigation relating to criminal law issues, particularly as those issues affect indigent defendants in federal court. Given that 18 U.S.C. § 16(b) has both immigration and criminal applications, *amicus* has particular expertise and interest in the issues presented in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In his brief, Respondent James Garcia Dimaya urges the Court to hold that *Johnson v. United States*, 135 S. Ct. 2251 (2015), a case striking down the "residual clause" of the Armed Career Criminal Act (ACCA) as unconstitutionally vague, applies equally to the similarly-worded "residual clause" in 18 U.S.C. § 16(b). Resp. Br. 10-20. Mr. Dimaya contends that the Court

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* made such a monetary contribution. Both parties have filed blanket letters of consent to the filing of *amicus* briefs with the Clerk's office.

of Appeals applied the proper void-for-vagueness standard and that the minor textual differences in the ACCA and § 16 residual clauses are immaterial and, if anything, only compound the latter's vagueness. Resp. Br. 16-20, 37-59.

Amicus National Association of Federal Defenders agrees with Mr. Dimaya that the § 16 residual clause is void for vagueness and does not endeavor to repeat his arguments here. Instead, *amicus* writes to address several of the government's points in light of federal defenders' experience at the forefront of criminal and immigration law. Immigration-related crimes now comprise 29.3 percent of federal prosecutions, exceeded only by drug crimes at 31.8 percent.[2] Having navigated the intersection of federal criminal and immigration codes for decades, as well as issues surrounding the Court's decision in *Johnson*, *amicus* is well-positioned to weigh in on the constitutionality of the § 16 residual clause, a statute with both criminal and immigration applications that lies at the heart of this case.

In *amicus'* opinion, the government's attempt to salvage the § 16 residual clause in the wake of *Johnson* fails, both as a legal and practical matter. First, the government's proposed dual vagueness standards for immigration and criminal proceedings are arbitrary and impractical given the inextricable connection between the two contexts. Second, the government's attempt to distinguish the § 16 residual clause from the ACCA residual clause would unsettle decades of precedent treating the two provisions as interchangeable. Finally, the government exaggerates the practical effect of applying *Johnson* to the § 16

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[2] U.S. Sent'g Comm'n, 2015 Sourcebook of Federal Sentencing Statistics, fig. A.

residual clause, overstating the impact of such a holding on other federal criminal statutes and ignoring the alternative "crime of violence" definition under § 16(a) that remains intact post-*Johnson*. For these reasons, the Court should declare the § 16 residual clause unconstitutionally vague.

ARGUMENT

I. Employing Separate Vagueness Standards In The Immigration And Criminal Contexts Is Arbitrary and Impractical.

While the government acknowledges that the § 16 residual clause has a "range of criminal and immigration applications," it nevertheless urges the Court to create a two-tiered vagueness test that changes the applicable constitutional standard based on whether an individual finds herself in immigration or criminal proceedings at any given moment. Pet. Br. 27, 45-46. For criminal proceedings, the government advocates the traditional standard that a statute must "give ordinary people fair notice of the conduct it punishes." Pet. Br. 21. But for immigration proceedings, the government advocates that a provision be struck down as unconstitutionally vague only where it is "so unintelligible as to effectively supply no standard at all." Pet. Br. 10-11, 21. This dual standard "makes sense," the government claims, given the "special nature of removal proceedings" and "the basic purposes of the vagueness doctrine." Pet. Br. 13, 25.

The government's proposed bifurcation of the vagueness standard relies on the premise that immigration and criminal proceedings function independently from one another, like parallel sets of train tracks. This is not accurate. Rather, the current criminal and immigration codes are a tangled web of

interlocking and cross-referencing provisions that would be rendered even more confusing and difficult to navigate under the government's suggested framework.

Take, for instance, the crime of illegally reentering the United States after a prior removal under 8 U.S.C. § 1326—the most commonly-charged immigration offense in federal district courts today, with 1,241 prosecutions in August 2016 alone.[3] In *United States v. Mendoza-Lopez*, this Court held that noncitizens charged with illegal reentry may challenge the government's use of a deportation order to satisfy an element of the offense when that deportation order did not comport with due process. 481 U.S. 828 (1987); see also 8 U.S.C. § 1326(d) (creating a statutory basis to challenge invalid civil administrative proceedings used as an element of a crime). As a result, a noncitizen who is deported, reenters the United States, and is subsequently apprehended and criminally prosecuted for this reentry may move to dismiss the indictment on the ground that her underlying administrative proceeding did not comport with due process. See, *e.g.*, *United States v. Camacho-Lopez*, 450 F.3d 928, 930 (9th Cir. 2006) (granting noncitizen's motion to dismiss the indictment where he was improperly removed as an aggravated felon). Such challenges are common, particularly in districts along the southwestern border with high rates of illegal reentry prosecution.

The government's dual vagueness standards would draw an arbitrary distinction between applications of the same statute, and lead to absurd results. If a

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[3] See "Immigration Prosecutions for August 2016," TRACImmigration, *available at*: http://trac.syr.edu/ tracreports/ bulletins/immigration/monthlyaug16/fil/.

noncitizen were convicted of a crime and placed in removal proceedings, the immigration judge would apply the "unintelligible" standard to determine whether an offense satisfying the § 16 residual clause could qualify as an aggravated felony and trigger her removal. But if the same person illegally reentered the United States one week later, the less demanding "fair notice" standard would govern the criminal proceedings—and, presumably, any motion to dismiss the indictment under § 1326(d). Thus, the same removal order that was valid for immigration purposes would *not* be valid for purposes of satisfying an element of the criminal offense, even though both relied on the identical aggravated felony statute and underlying crime.

Similarly, Congress created an incremental punishment framework that ties the maximum statutory sentence for an illegal reentry conviction to the noncitizen's criminal history. See 8 U.S.C. § 1326(b). Under this framework, noncitizens previously convicted of an ordinary felony face a maximum sentence of ten years in prison, while noncitizens convicted of an aggravated felony face a maximum of twenty years. See 8 U.S.C. § 1326(b)(1) and (2). As with the § 1326(d) motion, a federal district court would presumably apply the less demanding "fair notice" standard to determine an individual's maximum criminal sentence, even though officials had previously applied the more demanding "unintelligible" standard to the very same conviction and statute during removal proceedings.

The Immigration and Nationality Act also created the crime of aiding or assisting a noncitizen convicted of an aggravated felony to illegally enter the United States, an offense carrying a ten-year maximum penalty. See 8 U.S.C. § 1327. By contrast, a person

convicted of bringing a noncitizen *not* convicted of an aggravated felony to the United States through a port of entry would face a maximum penalty of one year of incarceration. See 8 U.S.C. § 1324(a)(2)(A). Were the government's dual vagueness standards to apply, a noncitizen could be removed on the basis of a crime that passed constitutional muster as an aggravated felony under the "unintelligible" standard—yet a person prosecuted for bringing that same noncitizen to the United States one week later might not have aided the entry of a noncitizen "convicted of an aggravated felony" under the "fair notice" standard. This is a recipe for arbitrariness and confusion.

The government's vagueness tiers would also complicate the responsibilities of criminal defense attorneys, who are ethically and constitutionally bound to advise their clients of the immigration consequences of criminal convictions. See *Padilla v. Kentucky*, 559 U.S. 356 (2010). Under *Padilla*, a criminal defense attorney representing a noncitizen must, at a minimum, "read[] the text" of the Immigration and Nationality Act and advise the client whether his guilty plea renders his removal "presumptively mandatory" as an aggravated felony. *Id.* at 368-69. But that same criminal defense attorney should also advise his client of the potential criminal penalties for illegal reentry triggered by the offense. See *Representing Immigrant Defendants in New York*, Immigrant Defense Project, 5th Ed. January 2011, section 3.5.D, p. 58 (recommending that defense attorneys advise clients on the criminal penalties for illegal reentry). In other words, a defense lawyer must explain to a client (who may have little education, limited English proficiency, and almost no understanding of legal complexities) why a particular crime would subject him to mandatory *removal* as an

aggravated felon in immigration proceedings, but not *criminal sanctions* as an aggravated felon in an illegal reentry prosecution.

A simple example shows the absurdities that would arise under the government's dual vagueness standards. Imagine that at the time of his original burglary charge, Mr. Dimaya's criminal defense attorney advised him that, because the § 16 residual clause is not void for vagueness under an "unintelligible" standard, a plea to his offense would be an aggravated felony and lead to his mandatory deportation. But the defense attorney then advised Mr. Dimaya that the same offense would *not* be an aggravated felony under the "fair notice" standard for criminal sentencing purposes if he were deported and illegally reentered. Confused and fearful, Mr. Dimaya decides to go to trial. A jury convicts him, and he is removed from the United States.

In an attempt to return to the United States, Mr. Dimaya asks his mother to drive him across the border and presents his brother's passport at the port of entry. Federal authorities are not fooled; he is arrested and prosecuted for illegal reentry. Given that the removal order is now an element of a crime, the federal judge applies the "fair notice" standard to the adjudication of his motion to dismiss the indictment under § 1326(d) and at his sentencing proceedings. But immediately after criminal proceedings conclude, immigration officials invoke the "unintelligible" standard to again remove Mr. Dimaya from the United States. Meanwhile, his mother is prosecuted under § 1327 for aiding and abetting an aggravated felon to enter the United States. But given the pure criminal nature of the mother's proceedings, the same judge applies the "fair notice" standard to conclude that Mr. Dimaya's crime is not an aggravated felony such

that his mother faces a maximum sentence of one year in prison, rather than ten years.

As this illustration demonstrates, criminal and immigration proceedings do not follow a linear, parallel trajectory; rather, they overlap and intertwine, not infrequently in the same proceeding. To apply different standards in these contexts would create a pointless distinction and needlessly confuse courts, attorneys, and defendants alike. Because the government's proposed bifurcated vagueness standard would be impractical and illogical, the Court should continue to apply the traditional "fair notice" standard in both criminal and immigration proceedings.

II. Distinguishing The ACCA And § 16 Residual Clauses Would Disrupt Established Precedent That Has Long Treated The Two As Interchangeable.

The government also argues that the § 16 residual clause "focuses on a more sharply defined category of risk" than the ACCA residual clause. Pet. Br. 12. Relying largely on a footnote in *Leocal v. Ashcroft*, 543 U.S. 1, 12 n.9 (2004), the government attempts to distinguish the "risk of force" language in the § 16 residual clause from the "risk of injury" language in the ACCA residual clause, arguing that the latter sweeps more broadly than the former. Pet. Br. 12. Thus, the government claims, "hard cases under the ACCA's residual clause are easier cases under Section 16(b)." Pet. Br. 32.

As an initial matter, the Court should be skeptical of the government's position because it represents a marked turn from the government's position in the past. As Mr. Dimaya's brief notes, the government conceded during *Johnson* litigation that the § 16 residual clause "is equally susceptible to petitioner's

central objection to the [ACCA] residual clause." Supp. Br. for the U.S. 22-23, *Johnson v. United States*, 135 S. Ct. 2551 (2015) (No. 13-7120). And long before *Johnson*, the government had urged courts to equate the § 16 residual clause with the ACCA residual clause. See, *e.g.*, *Bazan-Reyes v. I.N.S.*, 256 F.3d 600, 609 (7th Cir. 2001) (noting the government's assertion that prior ACCA precedent "require[d]" the court to find that the offense also satisfied the § 16 residual clause, which is "substantially similar" to ACCA and "aimed at the same type of risky or reckless behavior"); *United States v. Hull*, 456 F.3d 133, 140–41 (3d Cir. 2006) (noting in a "risk of force" case that "[t]he Government suggests that we look to cases interpreting U.S.S.G. § 4B1.2[4] for guidance"); *United States v. Chapa-Garza*, 243 F.3d 921, 925 (5th Cir. 2001) ("The government urges that we interpret section 16(b) the same way the Seventh Circuit interpreted U.S.S.G. § 4B1.2(a)(2).").

In fact, the government's position equating the § 16 and ACCA residual clauses dates back to the Sentencing Commission's 1989 decision to amend the career offender definition to require an ACCA-like "risk of injury," rather than a § 16(b)-like "risk of force." See U.S. Sentencing Guidelines Manual

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[4] The career offender enhancement in the United States Sentencing Guidelines ("U.S.S.G.") contains identical language to the ACCA residual clause. See U.S.S.G. § 4B1.2(a)(2) (defining as a "crime of violence" an offense involving conduct that "presents a serious potential risk of physical injury"); 18 U.S.C. § 924(e)(2)(B)(ii) (same). Because courts have treated these provisions as identical to one another, *amicus* includes examples of § 4B1.2(a)(2) cases in this section. See, *e.g.*, *United States v. Dawn*, 685 F.3d 790, 800 n.5 (8th Cir. 2012) ("We interpret the term violent felony in 18 U.S.C. § 924(e) in the same manner that we interpret the term crime of violence in U.S.S.G. § 4B1.2.") (quotations and alterations omitted)).

Appendix C, Amendment 268 (1989). In this Amendment, the Sentencing Commission explained that the new language was derived from the ACCA residual clause and designed only to "clarify" the "crime of violence" definition.[5] *Id.* Relying on this Amendment, the government argued that § 16 residual clause precedent applied in U.S.S.G. § 4B1.2 cases, claiming that the amendment "did not evince an intent to change its meaning" but was "only intended to 'clarify the definition[] of crime of violence.'" Petition for Rehearing for the United States of America v. Chapa-Garza, 2001 WL 34713050 (5th Cir. Apr. 13, 2001 (quoting Amendment 268 and again arguing that prior "risk of injury" precedent "requires" a finding that the offense satisfy the § 16(b) residual clause); see also *Bazan-Reyes*, 256 F.3d at 609 (observing that the government "points out that the Sentencing Commission . . . noted that the amendment was not intended to change the substance of the guideline, but only to clarify the language"). Given the government's historic advocacy of treating the two residual clauses as interchangeable, its newfound position should be viewed with skepticism. See *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position.") (internal quotation marks and citation omitted).

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[5] The Sentencing Commission's "clarification" further supports the conclusion that the ACCA and § 16 residual clauses suffer from the same defect, for if the "risk of injury" language was meant to "clarify" the "risk of force" language, the latter could hardly have been seen as *more* "sharply defined" than the former. Pet. Br. 12.

Following the government's lead, the Courts of Appeals have frequently concluded that the "small differences in language" between the ACCA and § 16 residual clauses are not "critical." *Xiong v. INS*, 173 F.3d 601, 606 n.2 (7th Cir. 1999). See also *Royce v. Hahn*, 151 F.3d 116, 120 (3d Cir. 1998) (stating that the provisions "differ only in minor detail"); *United States v. Gosling*, 39 F.3d 1140, 1142 (10th Cir. 1994) (describing the definitions as "substantially similar"); *Roberts v. Holder*, 745 F.3d 928, 930 (8th Cir. 2014) (finding the terms "virtually identical"). As a result, many courts have relied on precedent interpreting one residual clause to construe the other. See *United States v. Kirk*, 111 F.3d 390, 394 (5th Cir. 1997) (holding that "the reasoning employed in § 16 cases is persuasive authority" for career offender Guidelines cases); *Rodriguez-Castellon v. Holder*, 733 F.3d 847, 863 n.7 (9th Cir. 2013) (observing that "courts have frequently relied on opinions analyzing [the "physical injury" clause] in considering whether a state crime constitutes a 'crime of violence' for purposes of § 16(b)").

If the risk of physical injury always swept more broadly than the risk of physical force, as the government claims (Pet. Br. 32), then one could perhaps expect courts to use § 16 residual clause cases to decide ACCA residual clause cases but not the opposite. Yet courts have not treated "crime of violence" precedent as a one-way street; rather, they have frequently relied on cases involving the purportedly "broader" ACCA residual clause to decide cases involving the purportedly "narrower" § 16 residual clause. See, *e.g.*, *United States v. Velazquez-Overa*, 100 F.3d 418, 421-22 (5th Cir. 1996) (relying on ACCA and career offender cases to find that taking indecent liberties with a child under Tex. Penal Code

Ann. § 21.11 satisfies § 16(b)); *Tapia Garcia v. I.N.S.*, 237 F.3d 1216, 1222–23 (10th Cir. 2001) (relying on career offender cases to find Idaho DUI an aggravated felony under § 16(b)); *United States v. Abraham*, 386 F.3d 1033, 1038 (11th Cir. 2004) (relying on career offender case to find federal kidnapping a "crime of violence" under language identical to § 16(b)); *Delgado-Hernandez v. Holder*, 697 F.3d 1125, 1127–28 (9th Cir. 2012) (relying on career offender case to find kidnapping under Cal. Penal Code § 207 an aggravated felony under § 16(b)); *United States v. Stout*, 706 F.3d 704, 708-09 (6th Cir. 2013) (relying on ACCA and career offender cases to find that escape under Ky. Rev. Stat. § 520.030 satisfied § 16(b)); *Rodriguez-Castellon*, 733 F.3d at 863 n.7 (relying on career offender cases to find lewd and lascivious acts with a 14 or 15 year-old satisfied § 16(b)).[6]

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[6] It is true that some courts have distinguished the ACCA and § 16 residual clauses. See, *e.g.*, *Aguiar v. Gonzales*, 438 F.3d 86, 88 (1st Cir. 2006); *United States v. Evans*, 478 F.3d 1332, 1343 (11th Cir. 2007); *Blake v. Gonzales*, 481 F.3d 152, 162 (2d Cir. 2007); *United States v. Houston*, 364 F.3d 243, 248 n.5 (5th Cir. 2004). But these cases all pre-date the Court's decision in *Begay v. United States*, which held that the ACCA residual clause requires more than mere injury; it requires an offense that necessarily involves "purposeful, violent, and aggressive conduct." 553 U.S. 137, 145 (2008). After *Begay*, at least one court has admitted that "it is unclear whether there is any meaningful difference between the two risk-based approaches." *United States v. Gomez-Leon*, 545 F.3d 777, 789 (9th Cir. 2008). So while the government relies heavily on *Leocal*'s purported distinction between "risk of force" and "risk of injury" cases, Pet. Br. 37-38, it is doubtful that any such a distinction survives *Begay*. See *Jimenez-Gonzalez v. Mukasey*, 548 F.3d 557, 562 (7th Cir. 2008) ("Despite the slightly different definitions, the Supreme Court's holding in *Begay* perfectly mirrored the analysis in *Leocal* regarding whether drunk driving was a crime of violence under Section 16(b).").

Were the Court to now provide different definitions for these provisions that have long been intertwined, the validity of every case that presumed their equivalence (and the validity of every case that relied on each of those cases) would be called into question. Lawyers and judges could no longer look to decades of well-developed case law to determine whether a § 16 residual clause offense qualified as a "crime of violence," because any case that could be traced back to reliance on the ACCA residual clause would be suspect. To prevent this unraveling of long-established precedent that has treated the ACCA and § 16 residual clauses as interchangeable, the Court should decline the government's invitation to distinguish the two.

III. The Government Exaggerates The Practical Consequences Of Invalidating The § 16 Residual Clause.

Finally, the government claims that invalidating the § 16 residual clause would have "deleterious consequences for both criminal justice and immigration enforcement." Pet. Br. 53. Specifically, the government lists nineteen federal criminal statutes that cross-reference the "crime of violence" definition, implying that a limitation on the scope of these statutes would substantially affect its ability to prosecute dangerous conduct if the Court were to rule in Mr. Dimaya's favor. Pet. Br. 53. With one qualification, the government also suggests that invalidating the § 16 residual clause would impact the "materially identical" definition of a "crime of violence" appearing in § 924(c), allowing "many prisoners with long-final convictions" under these provisions to conceivably seek collateral relief. Pet. Br. 53-54.

The government's concerns are exaggerated because the § 16 "crime of violence" definition will still sweep within it any offense that has as an element the "use,

attempted use, or threatened use of physical force against the person or property of another"—a definition that all parties agree will remain untouched by the Court's decision here. See 18 U.S.C. § 16(a); Pet. Br. 51; Resp. Br. 58. Since 2014, courts have relied on this "use of force" definition to find a variety of state assault, battery, aggravated menacing, criminal threats, and robbery offenses "crimes of violence."[7]

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[7] See, *e.g.*, *Yates v. United States*, __ F.3d __, 2016 WL 7030342, at *1 (7th Cir. Dec. 2, 2016) (battery by a prisoner under Wis. Stat. § 940.20(1)); *United States v. Seabrooks*, 839 F.3d 1326, 1338 (11th Cir. 2016) (armed robbery under Fla. Stat. § 812.13); *United States v. Maldonado-Palma*, 839 F.3d 1244, 1249 (10th Cir. 2016) (aggravated assault with a deadly weapon under N.M. Stat. Ann. § 30–3–2(A)); *United States v. Howell*, 838 F.3d 489, 490 (5th Cir. 2016) (family-violence assault by strangulation under Texas Penal Code § 22.01(a)(1), (b)(2)(B)); *United States v. Duncan*, 833 F.3d 751, 752 (7th Cir. 2016) (robbery under Indiana Code § 35–42–5–1); *Arellano Hernandez v. Lynch*, 831 F.3d 1127, 1129 (9th Cir. 2016) (attempted criminal threats under Cal. Penal Code § 422); *Hill v. United States*, 827 F.3d 560, 561 (7th Cir. 2016) (Illinois attempted murder and aggravated discharge of a firearm under 720 ILCS 5/8–4(a) and 720 ILCS 5/24–1.2(a)); *United States v. Waters*, 823 F.3d 1062, 1064 (7th Cir. 2016) (Illinois domestic battery under § 5/12-3.2(a)(1)); *United States v. Fields*, 823 F.3d 20, 34 (1st Cir. 2016) (assault with a deadly weapon under Mass. Gen. Laws ch. 265, § 15B(b)); *United States v. Thomas*, 838 F.3d 926, 929 (8th Cir. 2016) (first-degree battery under Arkansas Code § 5–13–201(a)(1)); *United States v. Ovalle-Chun*, 815 F.3d 222, 224 (5th Cir. 2016) (Delaware aggravated menacing); *United States v. Collins*, 811 F.3d 63, 66 (1st Cir.), *cert. denied*, 136 S. Ct. 2397, 195 L. Ed. 2d 769 (2016) (Maine criminal threatening with a deadly weapon under 17–A M.R.S. § 209(1)); *Reyes-Soto v. Lynch*, 808 F.3d 369, 370 (8th Cir. 2015) (South Carolina pointing a firearm under § 16–23–410); *United States v. Maid*, 772 F.3d 1118, 1120 (8th Cir. 2014) (assault while displaying a dangerous weapon under Iowa Code §§ 708.1(3), 708.2(3)); *United States v. Segovia*, 770 F.3d 351, 355 (5th Cir. 2014) (Maryland robbery with a dangerous and deadly weapon); *United States v. Elliott*,

Thus, a decision in Mr. Dimaya's favor will not gut § 16 or allow violent offenders to go unpunished, as any crime that has as an element the "use, attempted use, or threatened use of force" will continue to trigger the same criminal sanctions it always has.

The government also warns that the decision in this case may impact the "materially indistinguishable" residual clause in 18 U.S.C. § 924(c)(3)(B), although it suggests that § 924(c) cases might be distinguished on the basis that they contain "a specified nexus to the use, carrying, or possession of a firearm." Pet. Br. 53-45, 53 n.11. Likewise, Mr. Dimaya's brief notes that one Court of Appeals has distinguished § 16 and § 924(c) on the basis that the latter applies to a "crime of violence" that occurs as part of the instant offense, rather than a past conviction. Resp. Br. 56. While *amicus* does not believe that the two statutes are distinguishable, it agrees with both parties that the

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757 F.3d 492, 495 (6th Cir. 2014) (Kentucky facilitation to commit robbery under Ky. Rev. Stat. Ann. § 506.080 and Ky. Rev. Stat. Ann. § 515.020); *United States v. Colon-Arreola*, 753 F.3d 841, 844 (9th Cir. 2014) (battery of a peace officer under Cal. Penal Code § 243(c)(2)); *United States v. Garcia-Figueroa*, 753 F.3d 179, 183 (5th Cir. 2014) (attempted aggravated battery on a law enforcement officer with a law enforcement officer's firearm under Florida Statute §§ 784.07, 777.04, and 775.0875); *United States v. Herrera-Alvarez*, 753 F.3d 132, 134 (5th Cir. 2014) (aggravated battery under Louisiana Revised Statutes § 14:34); *United States v. Cabrera-Perez*, 751 F.3d 1000, 1002 (9th Cir. 2014) (aggravated assault under Ariz. Rev. Stat. § 13–1203(A)(2)); *Roberts v. Holder*, 745 F.3d 928, 929 (8th Cir. 2014) (third-degree assault under Minnesota Statutes Annotated § 605.223(1)); *United States v. Carrasco-Tercero*, 745 F.3d 192, 199 (5th Cir. 2014) (New Mexico aggravated assault under N.M. Stat. Ann.. § 30–3–2); *United States v. Mitchell*, 743 F.3d 1054, 1057 (6th Cir. 2014) (Tennessee robbery under Tenn. Code Ann. § 39–2–501(a)).

constitutional validity of § 924(c)(3)(B) is not within the scope of the question presented here and need not be resolved by the Court at this time. Pet. Br. 53 n.11; Resp. Br. 56.

Finally, the government's reference to nineteen other statutes that would be impacted by a finding of unconstitutional vagueness overstates the impact this holding would have on federal criminal practice. Analyzing data from the U.S. Sentencing Commission,[8] *amicus* could find no convictions in 2014 or 2015 under at least twelve of the nineteen statutory subsections the government lists, and the remaining seven subsections garnered a collective total of only 49 convictions during those two years.[9] Those 49 convictions represent approximately .03 percent of all federal convictions that occurred during 2014 and 2015.[10] In other words, convictions under these

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[8] This data was extracted from the U.S. Sentencing Commission's Individual Offender Datafiles by Dr. Paul J. Hofer, Policy Analyst, Sentencing Resource Counsel Project. Federal Public and Community Defenders, and former Special Projects Director, U.S. Sentencing Commission.

[9] See 18 U.S.C. § 841(o) (five convictions); 18 U.S.C. § 1028(b)(3)(B) (none); 18 U.S.C. § 4042(b)(3)(B) (none); 18 U.S.C. § 25(a)(1) (none); 18 U.S.C. § 119(b)(3) (none); 18 U.S.C. § 931(a)(1) (five convictions); 18 U.S.C. § 1956(c)(7)(B)(ii) (none); 18 U.S.C. § 3181(b)(1) (none); 18 U.S.C. § 3663A(c)(1)(A)(i) (none); 18 U.S.C. § 842(p)(2) (none); 18 U.S.C. § 929(a)(1) (none); 18 U.S.C. § 1039(e)(1) (none); 18 U.S.C. § 1952(a) (four convictions); 18 U.S.C. § 1959(a)(4) (three convictions); 18 U.S.C. § 2250(c) (one conviction); 18 U.S.C. § 2261(a) (22 convictions); 18 U.S.C. § 3142(f) (none); 18 U.S.C. § 3559(f) (nine convictions); 18 U.S.C. § 3561(b) (none).

[10] See U.S. Sent'g Comm'n, 2015 Sourcebook of Federal Sentencing Statistics, Table 2 (2015), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/Table02.pdf (71,003 Guideline offenders in FY 2015); U.S. Sent'g Comm'n, 2014 Sourcebook of Federal Sentencing Statistics, Table 2 (2014),

nineteen statutes are uncommon, and their absence would not meaningfully affect the government's ability to prosecute violent offenders.

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http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/Table02.pdf (75,836 Guideline offenders in FY 2014).

CONCLUSION

Because the government's position would create arbitrary vagueness standards for criminal and immigration proceedings, unsettle established precedent treating the ACCA and § 16 residual clauses as interchangeable, and have little effect on the government's ability to prosecute violent conduct, *amicus curiae* asks the Court to affirm the Court of Appeals' decision holding the § 16 residual clause void for vagueness.

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